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RECORD AND BRIEFS

No. 16-6219

IN THE
Supreme Court of the United States

ERICK DANIEL DAVILA,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. The Fifth Circuit Court of Appeals denied the petitioner a certificate of appealability to appeal an ineffective-assistance-of-appellate-counsel claim that was rejected as procedurally defaulted and meritless. Should the Court grant certiorari to consider whether the equitable rule established in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Texas*, 133 S. Ct. 1911 (2013), can serve as cause to overcome the default where the underlying claim has no merit and the petitioner has already received the only remedy available under *Martinez*—federal habeas review of an otherwise defaulted claim?

2. Texas's capital sentencing scheme requires jurors to make all factual determinations necessary for a death sentence. Should the Court grant review to consider whether, in light of *Hurst v. Florida*, 136 S. Ct. 616 (2016), Texas's mitigation special issue—which offers the jury the opportunity to impose a life sentence instead of death—must be found by a jury beyond a beyond a reasonable doubt?

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RESPONDENT'S BRIEF IN OPPOSITION

In February 2009, a Texas jury convicted Erick Daniel Davila of capital murder and sentenced him to death. Davila had armed himself with a high-powered semiautomatic SKS assault rifle equipped with an infrared scope and opened fire on a crowd of largely women and children attending a birthday party at a home in Fort Worth, Texas, killing Annette Stevenson and her five-year-old grandchild, Queshawn Stevenson. Davila now petitions this Court for a writ of certiorari, complaining that the Fifth Circuit erred in denying him a certificate of appealability (COA) to appeal the denial of habeas corpus relief on a claim of ineffective assistance of appellate counsel (IAAC) that was rejected as procedurally defaulted and meritless; and a claim challenging Texas's mitigation special issue under *Apprendi*, *Ring*, and *Hurst*,[1] that was denied for lack of merit.[2] Davila is unable to present any important reason to grant review. The district court's resolution of his claims is consistent with federal habeas jurisprudence, and would not be debated by jurists of reason.

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[1] *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring. v. Arizona*, 536 U.S. 584 (2002); *Hurst v. Florida*, 136 S. Ct. 616 (2014).

[2] *Davila v. Stephens*, No. 4:13-cv-506-O, 2015 WL 1808689 (N.D. Tex, April 21, 2015) (Memorandum Opinion and Order); *Davila v. Davis*, No. 15-70013, 2016 WL 317870 (5th Cir. May 31, 2016) (unpublished). The district court's opinion is Davila's Appendix (App.) B and the Fifth Circuit's decision is Davila's App. A.

The Court should therefore deny certiorari review.

STATEMENT OF THE CASE

I. The Evidence at Trial

The district court provided the following summary of the evidence of Davila's capital crime:

> On April 6, 2008, eleven-year-old Cashmonae Stevenson, along with numerous friends and relatives, celebrated her sister Nahtica's ninth birthday at a "Hannah Montana" birthday party at her grandmother's home in the Village Creek Townhouses in Fort Worth.[3] Except for Cashmonae's uncle, Jerry Stevenson, all of the guests were women and children. About 8:00 p.m., just as the fifteen children were eating ice cream and cake on the front porch, Cashmonae saw a black Mazda slowly drive by. Inside was a man holding a gun with "a red dot" on it. Cashmonae "felt in her stomach" that something bad was going to happen because "no one ever rolled by with a gun pointed towards our house." Her uncle Jerry said, "The fool has a K in the car."[4] And then Cashmonae heard her grandmother, Annette Stevenson, say, "They trying to find trouble."
>
> A few minutes later Cashmonae saw a man run across the field, stand next to the house in front of theirs, and start shooting with "the red dot" pointed at their porch.[5] He kept shooting at them as

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[3] This neighborhood was known for gang-related violence, frequently between the Bloods, who used red as their "color," and the Crips, who used blue.

[4] Jerry later testified that he thought the rifle was an AK-47; in fact, it was an SKS. The two rifles are similar in appearance and function.

[5] Jerry Stevenson testified that he saw the gunman, dressed all in black, shooting at them, so he grabbed his son's hand, pulled him into the house, and threw him into a corner to protect him as he saw his mother stagger through the door and walk toward her bedroom. When Jerry saw that his daughter, Queshawn, was not

> the children and adults "stacked up on top of each other" as they tried to run through the front door. They were all screaming and trying to get to safe places inside. Cashmonae saw her uncle, Jerry Stevenson, lay his five-year-old daughter, Queshawn, down on the sofa. She was bleeding and looked dizzy. According to Jerry, "her guts was hanging out." After the gunshots ended, Cashmonae discovered that she had been shot in the elbow, the hand, and the shoulder. Nahtica and another little girl, Brianna, as well as Sheila Moblin, one of the adults at the party, had also been shot. Cashmonae's grandmother, Annette, had been killed, as had five-year-old Queshawn.
>
> * * *
>
> By the time the first police officer arrived, it was a chaotic scene. There was a dead woman—Annette Stevenson—in the back bedroom, a seriously injured child—Queshawn—on the couch in the living room, two more children with leg wounds in the dining room, blood splattered everywhere, and both adults and children screaming and trying to help or console the wounded and each other. Crime scene officers found four shell casings beside the air conditioning unit across the street and four more scattered in the street where the second series of shots had been fired. They photographed the bullet holes found all along the porch walls and in the windows of the Stevenson home.

Davila's App. B at *1-2 (citing *Davila v. State*, No. AP-76,105, 2011 WL 303265, at *1-3 (Tex. Crim. App. Jan. 26, 2011) (unpublished) (footnotes in original but omitted by the district court). The Fifth Circuit provided this additional account of the evidence at trial:

> A police investigation led to the arrest of Davila, who gave four

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inside, he ran to the door, and saw her lying on the front porch. He ran out, picked her up, and carried her back inside.

> written statements over the course of seven hours in custody after his arrest. Davila was a member of the Bloods gang. Davila's third statement included admissions that he and his friend had been driving around in his girlfriend's black Mazda and decided to have a "shoot em up." [Davila] said he was trying to shoot "the guys on the porch and ... trying to get the fat dude." He stated he did not know the name of the "fat dude," but recognized him. As for the "guys on the porch," Davila appeared to have mistaken some of the adult women at the party for men because the only male at the party was Jerry [Stevenson]. This confession, along with other evidence, was presented at Davila's trial and led to his conviction.

Davila's App. A at *1.

II. The Evidence at Punishment

Davila does not challenge the sufficiency of the evidence presented by the parties during the punishment phase. As summarized by the Fifth Circuit:

> At the punishment phase, the State introduced aggravating evidence: Davila had attempted to escape from jail and seriously injured a detention officer in the process; he had committed an aggravated robbery and an additional murder only two days before the birthday party shooting; he also had been convicted for burglary of a habitation in 2006.
>
> For the mitigation case, the defense offered testimony from Davila's father, sister, mother, maternal aunts, and a psychologist, Dr. Emily Fallis. In summary, they testified that Davila had been raised solely by a teenage mother, with his alcoholic father having been incarcerated for murder since he was very young. Davila's mother told him that he was conceived when his father sexually assaulted her. She was neglectful, abusive, and hateful towards Davila and his sister, and even made them leave the house as teenagers. Davila's sister testified about physical fights she had with their mother. After deliberation, the jury returned a sentence of death.

Davila's App. A at *1.

III. Procedural History

Davila was convicted of capital murder in February 2009, for intentionally killing more than one person in the same criminal transaction. Davila's App. E. Following a separate punishment hearing, the jury answered "yes" to the special sentencing issue on future dangerousness and "no" to the issue on mitigation. Tex. Code Crim. Proc. art. 37.071, §§ (2)(b)(2) & (2)(e). Based on the jury's answers, the trial court sentenced Davila to death. *State v. Davila*, No. 1108359D (Crim. Dist. Ct. No. 1, Tarrant Co., Tex. Feb. 27, 2009).

The Texas Court of Criminal Appeals (TCCA) affirmed Davila's conviction and sentence on direct appeal. *Davila v. State*, No. AP-76,105, 2011 WL 303265, at *10 (Tex. Crim. App. Jan. 26, 2011), *cert. denied*, 132 S. Ct. 258 (2011).[7]

While his appeal was pending, Davila, through court-appointed habeas counsel, filed an application for state writ of habeas corpus. After conducting an evidentiary hearing, the convicting court issued findings and conclusions recommending the denial of habeas relief. Davila's App. C. The TCCA adopted

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[7] A copy of the TCCA's unpublished opinion is Davila's App. D.

the same, noted that two claims were also defaulted, and denied the writ application. *Ex parte Davila*, No. WR-75,356-01, 2013 WL 1655549 (Tex. Crim. App. Apr. 17, 2013) (unpublished), *cert. denied*, 134 S. Ct. 784 (2013).

Davila timely filed a petition for writ of habeas corpus on April 14, 2014, which he subsequently amended. *Davila v. Stephens*, No. 4:13-cv-00506-O (N.D. Tex.) (Pet., ECF No. 16; Am. Pet., ECF No. 17). On April 21, 2015, the district issued a "Memorandum Opinion and Order" in which it denied Davila's amended petition and denied COA. *Id.* (Mem. Op. & Order, ECF No. 38; F. Jdgmt., ECF No. 39); Davila's App. B. The Fifth Circuit, finding that reasonable jurists would not debate the resolution of any of the claims on procedural and/or merits-based grounds, denied COA in an unpublished, per curiam opinion on May 31, 2016. Davila's App. A at *8. Davila petitioned for rehearing, and was denied relief. *Davila v. Davis*, No. 15-70013 (5th Cir. June 28, 2016) (unpublished order). The instant proceedings now follow.

REASONS FOR DENYING THE WRIT

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10. Davila fails to advance a compelling reason for this Court to exercise its certiorari jurisdiction and none exists.

Both the Fifth Circuit and the district court below denied Davila a COA to appeal his federal habeas claims. To obtain a COA for his procedurally-defaulted claim of ineffective assistance on direct appeal, Davila must show that reasonable jurists would debate whether the district court was correct in its procedural ruling and whether his petition states a valid claim on the merits. *Slack v. McDonald*, 529 U.S. 473, 484 (2000). To obtain a COA for his claim that was denied on the merits challenging the constitutionality of Texas's mitigation special issue, Davila must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Davila cannot make the requisite showing for either of his claims.

I. There is No Compelling Reason to Grant Certiorari Review of Davila's Procedurally-defaulted and Meritless IAAC Claim.

On federal habeas review, Davila argued that his counsel on direct appeal was ineffective for failing to recognize and raise a claim that he was convicted through the use of an improper jury instruction on transferred intent. Am. Pet., ECF No. 17 at 81-90.[8] The district court correctly held that

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[8] Davila did not raise the purported jury charge error as a substantive claim for federal habeas relief. *See generally* Am. Pet., ECF No. 17.

the IAAC claim was unexhausted and defaulted, and rejected Davila's argument that *Martinez* and *Trevino* should extend to excuse the procedural bar. App. B at *19-20; *see* Order, ECF No. 34 at 2-4. However, the district court additionally concluded that even if Davila could avoid procedural default, his IAAC claim did not merit relief because he failed to show deficient performance and prejudice. App. B at *20-23. The Fifth Circuit denied Davila a COA, concluding that reasonable jurists could not debate the procedural ruling or the lack of a constitutional violation. App. A at *4.

Davila petitions the Court to grant review of the Fifth Circuit's decision in order to consider whether *Martinez* and *Trevino* "can be seen as cause" to excuse the default of a substantial IAAC claim. Pet. at 16. Davila presents no compelling reason to consider this claim. Davila has waived review of the merits of his IAAC claim and fails to addresses how *Martinez* and *Trevino* apply to the facts of his case. To the extent Davila's claim is properly before this Court, it presents no issue worthy of certiorari because the IAAC claim is undeniably defaulted and meritless.

A. Davila has waived review of his IAAC claim.

To the Fifth Circuit and district court below, Davila argued that his appellate attorney provided ineffective assistance by failing to raise a point of

error on direct appeal complaining that he was convicted by the use of an improper jury instruction. *E.g.*, Am. Pet., ECF No. 17 at 81-90. Although Davila petitions this Court for review of the Fifth Circuit's denial of COA, he does not argue the purported merits of his underlying IAAC claim. *See* Pet. at 16-20. Nor does Davila argue that the district court's procedural bar ruling was factually or legally erroneous. *See id.* Instead, Davila contends that the holding in *Martinez* should be extended to substantial claims of ineffective assistance of appellate counsel. *Id.* at 16-20. However, even then Davila does not argue that his own IAAC claim is substantial, that state habeas counsel was constitutionally ineffective in failing to raise the claim, and that he suffered actual prejudice by habeas counsel's omission.

Davila has waived his underlying IAAC claim, as well as the purported applicability of his *Martinez* and *Trevino*-based arguments, by failing to brief the issues to this Court. *E.g.*,*United States v. Thames*, 214 F.3d 608, 612 n.3 (5th Cir. 2000) (holding that unargued and inadequately briefed issues are waived); *Royal v. Tombone*, 141 F.3d 596, 599 n.3 (5th Cir. 1998) (holding that appellant waived issue inadequately briefed on appeal); *Pyles v. Johnson*, 136 F.3d 986, 996 n.9 (5th Cir. 1998) (holding that issues not raised and argued in the initial brief on appeal are waived); *Cinel v. Connick*, 15 F.3d 1338, 1345

(5th Cir. 1994) (holding same).

B. The Fifth Circuit correctly denied a COA because Davila's IAAC claim is undoubtedly defaulted and meritless.

To obtain a COA, Davila must show that reasonable jurists would debate the district court's procedural-default ruling and its merits-based resolution of the constitutional claim. *Slack*, 529 U.S. at 484. The Court should deny review because Davila's arguments focus solely on the procedural ruling and ignore the second half of the COA standard. *See* Pet. at 16-20. Yet even if the Court were to hold that *Martinez* excuses the default of a "substantial" IAAC claim, Davila's claim is meritless and he has already received the remedy available under *Martinez*—federal habeas review of his defaulted IAAC claim. App. B at *19-23. Because Davila's arguments present no important reason to grant review, the Court should deny his petition for writ of certiorari.

1. The district court was correct in its procedural bar ruling.

Under 28 U.S.C. § 2254(b), a federal court may not grant habeas relief unless the petitioner has first exhausted state remedies with respect to the claim at issue. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). The district court found that Davila failed to exhaust state remedies because he did not present his IAAC claim in state court. App. B at *20 (citing Order, ECF No. 35). Davila

does not dispute this determination.

A procedural default occurs when "the court to which the petitioner would be required to present his claim in order to meet the exhaustion requirement would now find the claims procedurally defaulted." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991). The district court determined that Davila's IAAC claim was defaulted because the alleged jury charge error and its absence from the appeal was apparent on the record when Davila's state habeas counsel filed the original habeas application and Texas's subsequent writ bar would prevent Davila from presenting the claim now in state court. App. B at *20 (citing *Coleman*, 501 U.S. at 735 n.1, and Tex. Code Crim. Proc. art. 11.071, § 5)). Davila does not dispute that his IAAC claim is procedurally defaulted.

A procedural bar may be excused by a showing of (1) "cause" and actual prejudice, or (2) fundamental miscarriage of justice. *Smith v. Johnson*, 216 F.3d 521, 524 (5th Cir. 2000). In *Martinez*, the Court held that for substantial claims of ineffective assistance of *trial counsel* that have been defaulted, the ineffective assistance of state habeas counsel may also excuse the procedural bar. *See Martinez*, 132 S. Ct. at 1318; *Trevino*, 133 S. Ct. at 1921 (extending *Martinez* to post-conviction applications filed in Texas).

Davila tried to avail himself *Martinez* and *Trevino* by seeking an extension of holdings in order to excuse his procedural default of his IAAC claim, but the district court correctly rejected his argument. In its Order denying Davila a hearing, the court explained, "Neither the Supreme Court nor the Fifth Circuit has expanded *Martinez* to include this scenario." Order, ECF No. 35 at 4. In its subsequent Memorandum Opinion and Order, the district court cited Fifth Circuit precedent which holds that *Trevino* had been extended to excuse the default of IAAC claims like that urged by Davila. App. B at *20 (citing *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014)).

On appeal, the Fifth Circuit also rejected Davila's attempt to extend *Martinez* to excuse the procedural bar, explaining that *Martinez* made an "unambiguous holding" to the effect that "ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." App. A at *4 (citing *Reed*, 739 F.3d at 778 n.16 (quoting *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013)). The Fifth Circuit denied COA, concluding that in light of the above-described controlling precedent, reasonable jurists would not debate the district court's conclusion that the claim of error "was procedurally defaulted because Davila failed to exhaust state court proceedings." *Id.* (citing *Blue v. Thaler*, 665 F.3d

647, 669 (5th Cir. 2011) (where arguments "are foreclosed by Fifth Circuit precedent, the correctness of the district court's decision to reject them is not subject to debate among jurists of reason.")).

Davila seeks review of the Fifth Circuit's decision, arguing that the "principles underlying *Martinez*" should apply equally to IAAC claims. *See* Pet. at 16-20. Since Davila encourages the Court to extend *Martinez* to IAAC claims, by definition he cannot show that reasonable jurists would debate the correctness of the district court's procedural default determination based on this Court's then-existing precedent.

In any event, the support relied on by Davila does not give rise to a valid claim that *Martinez* should be extended in the manner he seeks. Initially, Davila cites to a Ninth Circuit opinion that has read *Martinez* as applying to IAAC claims, but the reasoning of that opinion has not been adopted by the Fifth Circuit. Pet. at 17 (citing *Nguyen v. Curry*, 736 F.3d 1287, 1293 (9th Cir. 2013)). Davila also cites to Justice Scalia's dissenting opinion in *Martinez* which recognized that the holding might extend to other claims that cannot be raised before the post-conviction stage, but a dissenting opinion speculating on possible unintended consequences is of no avail. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting)).

Finally, Davila argues that a Circuit split has arisen between the Ninth Circuit's decision in *Nguyen* and decisions from the Fifth, Sixth, Seventh, Eighth, and Tenth Circuits which have declined to extend *Martinez* beyond substantial claims of ineffective assistance of trial counsel. Pet. at 19 (citing *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014); *Hodges v. Colson*, 727f.3d 517, 530-31 (6th Cir. 2013); *Long v. Butler*, 809 F.3d 299, 315 (7th Cir.); *Dansby v. Norris*, 682 F.3d 711, 728-29 (8th Cir. 2012), *rev'd on other grounds*, 133 S. Ct. 2767 (2013); *Banks v. Workman*, 692 F.3d 1133, 1147-48 (10th Cir. 2012)). If the Court was willing to address a potential circuit split, Davila's case is not an appropriate vehicle for doing so. The issue on which the split purportedly exists—whether the holding in *Martinez* excuses the procedural default of a substantial claim of appellate-counsel ineffectiveness—has no potential application to Davila. As explained in the following section, the allegedly erroneous jury instruction that serves as the basis for Davila's claim of appellate-counsel ineffectiveness was not properly preserved for review with a trial objection. Davila's claim of jury-instruction error is also not based on any accepted legal interpretation of state law. And most importantly, Davila's IAAC claim was already raised and rejected in federal court on procedural grounds and for lack of merit. As a result, he has already obtained the remedy

that might be available to him if *Martinez* applies to IAAC claims, a review of the merits of his defaulted claim. Under such circumstances, the Court has no reason to grant review.

2. Even if Davila could overcome the procedural default, the district court's assessment on the merits is not debatable.

Davila underlying IAAC claim alleges that his attorney failed to raise a claim on direct appeal that he was convicted based on an improper supplemental jury instruction on transferred intent. *See Am.* Pet., ECF No. 17 at 81-90. As an alternative ruling to the default, the district court reviewed the merits of Davila's claim and, finding no merit, denied habeas relief. App. B at *20-23.[9] Reasonable jurists would not debate the district court's resolution of the constitutional claim.

At trial, the jury was given the following instructions regarding capital murder:

> A person commits an offense of "capital murder" if he commits murder and murders more than one person during the same criminal transaction. A person commits an offense of "murder" if he intentionally or knowingly causes the death of an individual.
> . . .

[9] If a procedural default is excused under *Martinez*, then a federal court may reach the merits of the underlying ineffective assistance of trial counsel claim. To the extent *Martinez* could ever apply to Davila's IAAC claim, he has already received the only remedy offered by *Martinez*—federal habeas review of the merits.

> A person acts "intentionally," or with intent, with respect to a result of his conduct when it is his conscious objective or desire to cause the result.
>
> A person acts "knowingly," or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
>
> . . .
>
> Now, if you find from the evidence beyond a reasonable doubt, that Erick Daniel Davila, in Tarrant County, Texas, on or about the 6th day of April 2008, did intentionally or knowingly cause the death of an individual, Queshawn Stevenson, by shooting her with a deadly weapon, to wit: a firearm, and did intentionally or knowingly cause the death of an individual, Annette Stevenson, by shooting her with a deadly weapon, to wit: a firearm; and both murders were committed during the same criminal transaction, then you'll find the Defendant guilty of the offense of capital murder.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty of capital murder as charged in the indictment and next consider the lesser included offenses of murder.

Davila's App. E at 1-2.

During their deliberations, the jury sent a note to the trial court asking for the following: "We need a clarification of the capital murder charge. In a capital murder charge, are you asking us did [Davila] intentionally murder the specific victims, or are you asking did he intend to murder a person and in the process took the lives of 2 others." App. E at 9. The trial judge returned a

written response that repeated the definitions of "intentionally" and "knowingly," the charge on capital murder and instruction on reasonable doubt, set out above. *Id.* at 10. The trial court also gave the additional charge on the law as follows:

> A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that a different person was injured, harmed, or otherwise affected.

App. E at 11. Defense trial counsel objected to the second supplemental instruction on the basis that the court should delay the charge until after the jury deliberated further. *See* ECF No. 11 at 22. The trial court overruled the objection and sent the instruction to the jury. *Id.* The jury continued its deliberations and within the hour, sent out a note stating it had reached a verdict. App. E at 12. Davila was ultimately convicted of capital murder.

In his Statement of the Case (but not in the questions Davila presents for review), Davila states that the jury was improperly instructed on Texas's transferred intent law in the capital murder context. Pet. at 5. He states that his attorneys argued at trial that he only intended to shoot his rival, Jerry Stevenson, and therefore he was not guilty of capital murder as multiple intents to kill were necessary for his capital murder conviction for killing two people in the same transaction. *Id.* Making no mention of the applicable legal

standards for reviewing claims of ineffective assistance, Davila states that appellate counsel "was ineffective for failing to raise the jury charge error on direct appeal," and state writ counsel "was ineffective for not raising a clearly meritorious claim [of] ineffective assistance of appellate counsel." *Id.* at 12, 13. Even if Davila had briefed the IAAC claim as an issue for review, he could not show that reasonable jurists would debate the district court's decision to deny habeas relief on the merits.

A criminal defendant is constitutionally entitled to effective assistance on direct appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). To establish that counsel's performance was objectively unreasonable, Davila must show "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins*, 528 U.S. 259, 287 (2000). To show prejudice, Davila must establish "a reasonable probability that, but for his counsel's unreasonable failure" to raise the claim, "he would have prevailed on appeal." *Id.* This does not mean that counsel must raise every non-frivolous ground available. *Schaetzle v. Cockrell*, 343 F.3d 440, 445 (5th Cir. 2003). Only "solid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention." *United States v. Williamson*, 183 F.3d 458, 462-63 (5th Cir. 1999).

The district court, reviewing the jury charge as a whole, found no purported error and denied Davila's IAAC claim. App. B at *20-23. As that court concluded, and Davila does not dispute, the complained-of supplemental instruction given the jury tracks the language of Section 6.04 of the Texas Penal Code, which reads "[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected." Tex. Penal Code § 6.04. Understandably, defense trial counsel did not lodge an objection to the supplemental charge on the basis that it was an incorrect statement of the law. App. B at *22. Appellate counsel cannot be ineffective for failing to raise a claim of error that was not preserved for appeal and was not erroneous.[10]

Additionally, Davila has previously argued that the supplemental jury instruction violated the rule in *Roberts v. State*, 273 S.W.3d 322, 331 (Tex. Crim. App. 2008),[11] that a defendant must have the necessary mental state

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[10] *See, e.g., Granviel v. State*, 552 S.W.2d 107, 121-22 (Tex. Crim. App. 1976) (preservation of error for review on appeal requires a defendant to object in a timely and specific manner).

[11] In *Roberts*, the TCCA stated that "[t]ransferred intent may be used as to a second death to support a charge of capital murder that alleges the deaths of more than one individual during the same criminal transaction only if there is proof of intent to kill the same number of persons who actually died." 273 S.W.2d at 330.

(intent or knowledge) with respect to the number of victims actually killed. Am. Pet., ECF No. 17 at 74-78. The district court, reviewing the jury charge in its entirety, again found no error:

> The "transferred intent" instruction was not given to the jury in isolation; it was given to the jury along with the language taken from the court's charge that repeated the statutory definitions for "intentionally" and "knowingly," as well as the application paragraph for capital murder. [Davila's App. E at 11-12]. In Texas, the application paragraph is the portion of the charge that authorizes conviction. *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013). The application paragraph for capital murder clearly required the jury to find Davila caused two intentional or knowing deaths in the same criminal transaction. In the event the jury fund that Davila killed only one person, the application paragraph did not allow the jury to convict Davila of capital murder.

App. B at *22-23. Furthermore, the error identified in *Roberts* is not implicated in Davila's case. In addressing Davila's claim of insufficient evidence to support his conviction (a claim not currently before this Court), the TCCA distinguished the facts of Davila's case from those in *Roberts* where the victim was a woman who, unbeknownst to the defendant, was pregnant. App. D at 8-11. There, the intent to kill one person did not transfer to support two killings. In contrast and as summarized in Part I of the Statement of the Case above,

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In 2012, the TCCA clarified that its statement in Roberts "was dictum" and was improvident, reasoning that "[i]t is certainly possible to intend more than once to kill a particular person. *Ex parte Norris*, 390 S.W.3d 338, 341 (Tex. Crim. App. 2012).

Davila's own statement establishes that he went to "a shoot em up" in which he intended to kill "the fat dude . . .in the middle of the street" and "the other 3 [guys] on the porch." Davila intended to kill four males, but shot and killed two females instead, Queshawn Stevenson and Annette Stevenson. Accordingly, Davila's appellate counsel did not provide ineffective assistance by failing to raise a point of error challenging the supplemental jury charge on transferred intent.

Because there is no erroneous jury instruction, the district court rejected Davila's IAAC claim for his failure to show that appellate counsel "unreasonably failed to discover a non-frivolous issue for appeal" and that the issue would have prevailed on direct appeal. App. B at *23. Davila fails to show that reasonable jurists would debate the assessment on the merits of this otherwise insubstantial and procedurally-defaulted claim.

II. There is No Compelling Reason to Grant Certiorari Review to Consider Whether Texas's Mitigation Special Sentencing Issue Withstands Constitutional Scrutiny in Light of *Hurst*.

Davila argues that Texas's death penalty statute, Article 37.071 of the Texas Code of Criminal Procedure, is unconstitutional because jurors are not required to make a finding on the mitigation special issue beyond a reasonable doubt under *Apprendi*, *Ring*, and *Hurst*. *See* Pet. at 20-32. Davila's contentions

present no cert-worthy issue.

In order to obtain a death sentence under Texas law, the State has the burden to prove beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § (2)(b)(1).[13] If the jury unanimously agrees to answer "yes" this "future dangerousness" special issue, it must then consider whether there are sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than death. *Id.*, § (2)(e)(1).[14] While the jury may not answer this "mitigation special issue" with "no" unless they unanimously agree, *id.*, § (2)(f), the sentencing scheme does not assign a burden of proof for either the defendant or the State to prove or disprove the sufficiency of mitigating circumstances at the punishment phase.

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[13] The jury in Davila's case was given Special Issue Number 1: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" Davila's App. F at 3.

[14] After the jury unanimously answered "'yes" to the future dangerousness issue, Davila's jury deliberated Special Issue Number 2, which asks: "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character, and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" Davila's App. F at 3.

Davila challenged the constitutionality of Texas's mitigation special issue on direct appeal and federal habeas, raising a Sixth Amendment claim under *Apprendi* and *Ring*. In *Apprendi*, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and provided beyond a reasonable doubt." 530 U.S. at 490. In *Ring*, the Court held that "[i]f a State makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." 122 S. Ct. at 2430 (citing *Apprendi*, 530 U.S. at 482-83). Because Texas's capital sentencing scheme is not similar to those encountered in *Apprendi* and *Ring*, the TCCA rejected Davila's claim on the merits, noting it had "repeatedly rejected this argument." *Davila*, 2011 WL 303265, at *10 & n.51 (citations omitted). The federal district court denied habeas corpus relief under AEDPA. App. B at *30 (citing *Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005)). Finding Davila's claim foreclosed by circuit precedent, the Fifth Circuit denied him a COA. App. A at *8 (citing *Rowell*). The appellate court concluded that, "No Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof[,]" and thus reasonable jurists would not debate the lower court's resolution. *See*

id. (quoting *Rowell*, 398 F.3d at 378).

Davila now asks the Court to grant certiorari review of this decision, arguing that the determination that no burden of proof is required for the Texas mitigation special issue conflicts with Supreme Court precedent because a jury's negative answer to the mitigation special issue is a prerequisite to imposition of a death sentence. *See* Pet. at 24-32.[15] Relying on this Court's recent decision in *Hurst v. Florida*, 136 S. Ct. 616, 622 (2016), Davila contends that *Apprendi* applies to any finding necessary for the sentence of death, not just those findings that increase the punishment to death eligibility. Pet. at 20, 23-26.

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[15] Davila additionally argues the Court should grant review because the decisions from the TCCA and Fifth Circuit "are now at odds with those of the Supreme Courts of Delaware and Missouri." Pet. at 32 (citing Sup. Ct R. 10(a), (b)); *see id.* at 26-27, 28-31. Those states are weighing jurisdictions but Texas is not, as explained below. This distinction is fatal to Davila's argument. For example, Davila points out that the Supreme Court of Delaware has recently decided that the state's capital sentencing statute is unconstitutional in light of *Hurst*. *Id.* at 26 (citing *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016)). However, the *Rauf* Court found the statute unconstitutional because it allows a judge to find an aggravating circumstance for the weighing phase, it fails to require unanimity regarding an aggravating circumstance for the weighing phase, it unconstitutionally allows a judge rather than the jury to weigh aggravating and mitigating circumstances, and it fails to require that aggravating circumstances outweigh mitigating circumstances. *Id.* at *1-2. These circumstances do not apply to Texas's capital-punishment system. Whether or not another state may have found constitutional infirmities in its own capital sentencing statute is no reason for the Court to grant certiorari review in this case.

Hurst does not support Davila's argument. In *Hurst*, the Court held that Florida's capital sentencing scheme violated *Ring* because a jury makes an advisory verdict while the judge makes the ultimate factual determinations necessary to sentence a defendant to death." *Hurst*, 136 S. Ct. at 621-22. *Hurst* merely reiterates that juries, not judges, must find all facts of a crime beyond a reasonable doubt. *See Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."). In contrast, there are no judicial factfindings in Texas's death-penalty scheme that could enhance a defendant's sentence beyond the prescribed range. *See Granados v. Quarterman*, 455 F.3d 529, 536 (5th Cir. 2006) ("All the elements of capital murder were put to the jury with instruction that the evidence had to persuade them beyond a reasonable doubt. No finding by the judge was required to expose Granados to the death penalty.") Because judges play no factfinding role in Texas's capital-punishment scheme, *Hurst* does not benefit Davila.

Further, in addition to the lack of judicial factfinding, Texas's death-penalty scheme substantially differs from Florida's. Unlike weighing states, in Texas the eligibility determination is made at the guilt-innocence phase of trial according to the elements alleged in the indictment. See *Turner v. Quarterman*,

481 F.3d 292, 299-300 (5th Cir. 2007) ("Texas capital juries make the eligibility decision at the guilt-innocence phase."). This is by virtue of the manner in which Texas defines the offense of capital murder.[16] In order to find a defendant guilty of capital murder in Texas, the jury must find murder *plus* an aggravator or aggravators, and it is this additional finding which renders the defendant death eligible. *See Jurek v. Texas*, 428 U.S. 262, 270 (1976) (Texas statute requires jury to find existence of statutory aggravating circumstance at guilt-innocence phase before death penalty may be imposed). Whether the defendant should be sentenced to death—the selection decision—is then made by the punishment jury at a Texas capital-murder trial.

The principles of *Apprendi* and *Ring* are thus inapplicable to Texas's

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[16] Under Section 19.03 of the Texas Penal Code, a person commits capital murder if the person commits murder (as defined under Section 19.02(b)(1)), and the murder is committed under one of nine listed circumstances: (1) the person murders a peace officer or fireman who is acting in lawful discharge of an official duty, and who the person knows is a peace officer or fireman; (2) the murder is committed while in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat; (3) the murder is committed for remuneration or promise of remuneration; (4) the person commits murder while escaping or trying to escape from a penal institution; (5) while incarcerated, the person murders someone employed in the operation of a penal institution; (6) while incarcerated, the person murders another individual; (7) the murder is committed against more than one person; (8) the person murders a child under the age of six years old; or (9) the person commits murder in retaliation for, or on account of, the service or status of the other person as a judge or other court personnel. *See* Tex. Pen. Code 19.03(a).

special-issue capital sentencing scheme. The Fifth Circuit has time and again recognized this important distinction and denied relief on such claims. *See, e.g.*, *Allen v. Stephens*, 805 F.3d 617, 627-28 (5th Cir. 2015) (holding that Texas's death penalty scheme does not violate either *Apprendi* or *Ring*), *cert. denied*, 136 S. Ct. 2382 (2016); *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007) (holding that Texas's death penalty scheme "did not violate either *Apprendi* or *Ring* by failing to require the State to prove beyond a reasonable doubt the absence of mitigating circumstances."); *Turner*, 481 F.3d at 299-300 (*Ring* is "inapposite to any discussion of the constitutional requirements of the selection phase."); *Granados*, 455 F.3d at 536-37 (holding that Texas did not violate any principle of *Apprendi* or *Ring* by not asking the jury to find an absence of mitigating circumstances beyond a reasonable doubt because "a finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death."); *Rowell*, 398 F.3d at 378 ("Texas capital juries make the eligibility decision at the guilt-innocence phase.... *Ring* is inapposite to any discussion of the constitutional requirements of the selection phase."). *Hurst* does not change the Fifth Circuit's jurisprudence.

Furthermore, Davila does not address *Kansas v. Carr*, in which this Court rejected the argument that the Eighth Amendment requires capital-

sentencing courts "'to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable double.'" 136 S. Ct. 633, 642 (2016) (citing *State v. Gleason*, 329 P.3d 1102, 1148 (2014)). The Court's reasoning in rejecting Carr's argument lends support to the Fifth Circuit's conclusion that this Court does not require a burden of proof for the mitigation special issue.

Addressing the question in *Carr* in the "abstract," this Court "doubt[ed] whether it is even possible to apply a standard of proof to the mitigating-factor determination (the so-called 'selection phase' of a capital-sentencing proceeding)." 136 S. Ct. at 642. The Court explained that requiring a burden of proof for "the aggravating-factor determination (the so-called 'eligibility phase')" was possible because it was a purely factual determination—the facts either did or did not exist, and one could thus require proof of existence beyond a reasonable doubt. *Id.* But the existence of a mitigating factor is a "judgment call" and subject to the individual juror's discretion. *Id.* "And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy[.]" *Id.*

As noted, Texas capital juries make the death-eligibility determination at the guilt-innocence phase, and then determine whether the sentence should

be imposed at the sentencing phase-the "selection phase." *Turner*, 481 F.3d at 299-300; *see also Johnson v. Texas*, 509 U.S. 350, 362 (1993). The Texas special issues do not "increase[] the penalty for [capital murder] beyond the prescribed statutory maximum" in violation of the Constitution. *See Apprendi*, 530 U.S. at 490. And although a Texas capital-sentencing jury must specifically answer the mitigation special issue in the negative to render a death sentence, the actual function of that special issue inures to the defendant's benefit by allowing the jury an avenue to give effect to mitigating evidence. Thus, the mitigation special issue is a vehicle through which the jury is given the opportunity to make an individualized determination of the offender's moral culpability, as required by the Supreme Court. *Penry v. Johnson*, 532 U.S. 782, 797 (2001); *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982). In making the decision, the jury is instructed to consider all the evidence, including the circumstances of the offense, the defendant's character and background, and general moral culpability of the defendant. Tex. Code Crim. Proc. art. 37.071, § 2 (e) & (f). The jury is not required to agree on what evidence supports an affirmative answer. *Id.* The mitigation issue confers upon the jury a broad ability to show leniency and reduce the defendant's sentence to life imprisonment. Thus, *Carr*'s conclusion that the aggravating factor is a factual

determination versus the mitigating factor, which is a discretionary "judgment call" and "mostly a question of mercy," *see* 136 S. Ct. at 642, seems to agree with the Fifth Circuit in that an affirmative finding of aggravation is different than a finding of mitigation, which reduces the sentence from the statutory maximum. *See Granados*, 455 F.3d at 537.

Ultimately the *Carr* Court concluded that the existing case law did not require jury instruction that mitigating circumstances need not be proven beyond a reasonable doubt. *Id.* In support, the Court relied on *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998), in which the Court upheld a death sentence even though the trial court "failed to provide the jury with express guidance on the concept of mitigation," as well as *Weeks v. Angelone*, 528 U.S. 225, 232-33 (2000), in which the Court reaffirmed that it has "never held that the State must structure in a particular way the manner in which juries consider mitigating evidence" and rejected argument that it was unconstitutional to instruct jurors to "'consider a mitigating circumstance if you find there is evidence to support it," without additional guidance. The same logic extends to preclude any burden-of-proof instruction for the mitigation special issue.

The Court's doubt about whether it is even possible to apply a burden of proof to the mitigating-factor determination at the least confirms that the

Court has not addressed the burden-of-proof issue for mitigation. *See Carr*, 136 S. Ct. at 642. Davila thus fails to demonstrate that the denial of COA and rejection of his *Apprendi*-based habeas claim was contrary to any clearly established federal law existing at the time his conviction because final. Furthermore, the Court's recent decisions do not lend support to Davila's argument and, in fact, are contrary to his position.

CONCLUSION

The Court should deny Davila's petition for writ of certiorari.

Respectfully submitted,

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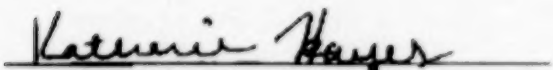

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No. 16-6219

IN THE
Supreme Court of the United States

ERICK DANIEL DAVILA,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on November 23, 2016, a copy of Respondent's Brief in Opposition was emailed and sent by U.S. mail delivery to Petitioner's counsel Mr. Seth Kretzer, 440 Louisiana St., Suite 200, Houston, TX 77002, seth@kretzerfirm.com, and Mr. Jonathan Landers, 2817 West T.C. Jester Blvd., Houston, TX 77018, jonathan.landers@gmail.com. All parties required to be served have been served. I am a member of the Bar of this Court.

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November 23, 2016

VIA OVERNIGHT MAIL
Honorable Scott S. Harris, Clerk
United States Supreme Court
Office of the Clerk
1 First Street N.E.
Washington, D.C. 20543

Re: *Erick Daniel Davila v. Lorie Davis*
Cause No. 16-6219

Dear Honorable Harris:

Enclosed for filing is Respondent's Brief in Opposition, Proof of Service and ten copies. Please indicate the date of filing on the copy of this letter and return it to me in the postpaid envelope provided.

I'm forwarding a copy of the same Brief to the Petitioner's Counsel. Thank you for your kind assistance in this matter.

Sincerely,

Katherine Hayes /aeh

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KDH/aeh
Enclosures

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